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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. PATRICK RATHSACK, Defendant and Appellant.	C040406 (Super. Ct. No. 00F04700)

A jury convicted defendant Patrick Rathsack of committing a lewd act on a child under 14 years of age by the use of force or duress, assault, and burglary. Defendant argues substantial evidence does not support the jury's finding he was sane at the time he committed the crimes or demonstrate his lewd intent. Defendant also claims his sentence of 25 years to life is cruel and unusual. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

By amended information, the People charged defendant with two counts of lewd acts on a child under the age of 14 by use of force or duress (Pen. Code,[1] § 288, subd. (b)(1)), one count of burglary (§§ 459/462, subd. (a)), and misdemeanor assault (§ 240), a lesser offense to the second lewd act charge. The information specifically charged the crime came within the definitions of the one strike law. (§ 667.61.) The trial was bifurcated into a guilt phase and a sanity phase.

I

Guilt Phase Evidence

Shannon M., the on-site manager for an apartment complex in Sacramento. Defendant and Richard L. lived in the same complex. Arthur S. and his children lived in the apartment just above defendant's.

At about 11:00 p.m. on May 12, 2000, Shannon M. conducted a walk-through inspection of the complex. After she returned to her apartment, she heard a noise outside like someone was kicking a door or a wall. She went out to investigate and saw a person climbing up the fence into the patio of Arthur S.'s upstairs apartment. Shannon M. shouted to the person, "what are you doing?" The person responded, "I have to save the little girl."

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Shannon M. ran back into her apartment and called Richard L. for help. Richard L. showed up in about a minute and Shannon M. went upstairs to investigate. She banged on the door of Arthur S.'s apartment.

Almost immediately, defendant unlocked and opened the door. He was dressed in camouflage pants, cowboy boots, and a trench coat. Shannon M. said he "looked like a zombie. [¶] . . . [¶] Like he was set to do a mission." Richard L. also testified defendant looked "like he was not himself. It was like he was off in another world. Seemed like he was spaced out for a second like he was surprised he got caught up there."

Defendant acknowledged Shannon M. by name. He told Shannon M. he was there to save the little girl. Richard L. testified defendant said there was a little girl who was bound and gagged in a "shitty" diaper and had been that way for three days.

Shannon M. saw a six-year-old girl sitting on the couch wrapped in a blanket. She looked surprised or frightened -- like she had just been awakened. Defendant walked back to the girl. Shannon M. shouted for Arthur S. to wake up. Arthur S. came into the room in his boxers.

Shannon M. told defendant she was going to call the sheriff. Defendant responded by telling Shannon M. not to call the police and that this matter did not concern her. At that point, defendant lunged toward Shannon M.. Richard L. jumped to her rescue and subdued defendant until the police arrived. Defendant smelled like he had been drinking beer, but he was not staggering, and his speech was not slurred.

After Richard L. told defendant "It's me, buddy" a couple times, defendant calmed down. Richard L. testified defendant appeared "like he was confused on what -- not sure of his actions of what he was doing. He just wanted to go back down and be in his apartment and be left alone." Defendant asked for a cigarette and seemed back to normal when Shannon M. gave him one. While Richard L. held defendant, defendant kept telling Richard L. he wanted to go back down to his house.

Shannon M. testified that not more than a couple of minutes elapsed between the time she called Richard L. and the time defendant opened the door.

When Sacramento Sheriff's Deputy Andrew Buchanan arrested defendant, he had a screwdriver in his pocket. Defendant appeared "very calm" and distant to the deputy. Defendant was unable to answer the deputy's questions about what was going on. The deputy reported that defendant was "mentally unstable." Despite his refusal to talk about what he was doing, defendant told the officer he was manic depressive and on three types of prescription medications.

At trial, the six-year-old victim testified she was trying to sleep in the living room of her home on a mat. Defendant came into the room through the sliding glass door. Defendant picked her up and put her on his lap on the couch facing away from him. Defendant touched her in the "wrong area," referring to the area between her legs. She also referred to it as her "private," meaning her vaginal area. Defendant did not say anything to her that night. The victim testified defendant

touched her on top of her underwear, but could not say how long defendant touched her. Defendant did not move his hand or her underwear while he touched her. She tried to get away from defendant but could not. On cross-examination, the victim testified her father told her to stick to her story and to stay on top of it.

Prior to trial, the victim's story was inconsistent. On the night of the incident, the victim told Deputy Buchanan defendant had not touched her "privates." The victim told her father the same story that night.

The night after defendant broke in, the victim told her father a little more about the incident. The victim said defendant had put his hand over her mouth so she could not scream. Arthur S. also testified his daughter told him defendant had touched her chest area and vaginal area.

As a result of these revelations, Arthur S. called the sheriff to take a second report. Sheriff Deputy Paul Jbeily responded to that call. He interviewed the victim, who told him defendant had touched her groin area. At the request of Deputy Jbeily, Arthur S. examined his daughter in another room. At trial, Arthur S. testified the victim's private area was red during that examination and that he would have told the officers that if they had asked. Deputy Jbeily, on the other hand, reported Arthur S. told him he had examined the victim's vaginal area and reported no redness or bleeding.

About a month after the incident, the victim was interviewed in the Multi-Disciplinary Interview Center by a

social worker. The basic facts the victim relayed to the social worker were consistent with her statement the day after the incident. During that interview, however, the victim told the social worker defendant touched her underneath her underwear on her "choo-choo."[2] The victim also stated defendant touched her top or her "tits." The victim also said defendant touched her mouth.

Shannon M. was the manager of the complex during the time defendant resided there. She had no problems with defendant during this time. About two months before this incident, she walked by defendant's apartment. His door was open and the lights were off. Shannon M. noticed large holes had been punched through the apartment's walls. Shannon M. reported this to her supervisor. Shannon M.'s supervisor reported defendant to the police and he was taken in for a mental health examination. He was gone for six or seven days.

The victim's father, Arthur S., had known defendant for a couple of years as neighbors. Arthur S. and defendant acknowledged each other as they passed in the complex. Defendant had been up to Arthur S.'s apartment a few times to complain about noise or Arthur S.'s children.

At the conclusion of the guilt phase, the jury convicted defendant on one count of lewd acts on a child under the age of 14 years by force or duress. On the second lewd act count,

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[2] At trial, the victim testified she did not use the term "choo-choo" to refer to her privates.

defendant was acquitted of the crime charged, but he was convicted of the lesser included offense of misdemeanor assault. The jury further found the one-strike enhancement to be true. The defendant was also convicted of burglary.

II

Sanity Phase Evidence

Because defendant challenges the sufficiency of the evidence on the question of defendant's sanity, we recount the testimony provided on this subject in detail. The parties stipulated the evidence received in the guilt phase was deemed received in the sanity phase and that the jury could consider it in its deliberations. During the sanity phase, the defendant testified along with two psychologists.

Defendant was born in 1967. He testified he was hospitalized two times as a teenager. The first time was for depression. The second hospitalization occurred when defendant was 16 and he agreed to go into an alcohol and drug abuse center that was within a state mental hospital. He stayed in that latter program for several months.

Defendant moved to California in 1984. He admitted to using drugs between 1984 and 1986. He drank alcohol, smoked marijuana, and used methamphetamine. Defendant was admitted to a detox center in 1986. After his treatment program, he was in a halfway house for about a year. Defendant claimed he stayed off drugs for the following 11 years -- between 1986 to 1997.

Defendant traced the onset of his mental problems to an accident at a lumber company where he stacked trusses. One day

a truss slipped off a forklift and hit him in the head. Defendant claimed that after this accident, he went through a big change and started to experience depression and paranoia. He stopped trusting his girlfriend, his friends, and started to carry a gun. It was at this time defendant first started to hear voices. Defendant was on disability for approximately four years after this accident.

In 1994, defendant was hospitalized for his first psychotic break. He was hearing voices and thought people were after him. Defendant gave the jury detailed testimony about these hallucinations. When defendant was discharged, the doctor prescribed Zoloft for him. Defendant still heard voices. The voices stopped sometime in 1994.

Defendant was on disability for mental illness when he was hospitalized again in 1995 or 1996. He was homeless at this time. Thereafter, he was committed to the Sacramento County Mental Health Center (SCMHC) and released after 24 hours because he was not a danger to himself or others or incapable of taking care of himself.

Defendant lived at a halfway house for mentally ill people for a year. During this time, he dated women, but he did not engage in any long-term relationships. Defendant stopped dating altogether in 1998 because his relationships were causing him too much stress.

After his time at the halfway house, defendant moved to the apartments at which the incident took place. He lived there for

about four years and worked irregularly for a telemarketing firm. Then he had another breakdown and did not work anymore.

During his last breakdown, defendant was hearing voices. He thought the voices were coming from the apartment above him, the television, the radio, and from the airwaves. He thought he was being tortured and kept under surveillance. He also believed there were several plots going on that included the FBI, the Hells Angels, and World War III. Defendant stopped taking his medication.

In an unrelated incident, defendant testified he entered a stranger's house at the request of the voices. He went into the kitchen and the living room and ultimately was arrested when he left the home. Defendant spent a month in the county jail. Then he returned to his apartment. Defendant continued to receive Social Security income for disability.

Shortly before his May 2000, commitment to SCMHC, defendant was trying to start his own business and was working long hours. He started to hear voices again. Defendant started to think people were watching him and talking to him as he walked down the street. He punched holes in the walls of his apartment because the voices asked him to demonstrate his martial arts techniques. Defendant testified he believed World War III was going on and it did not matter what he did to his apartment. The police visited his apartment the next day and that led to defendant's hospitalization at SCMHC in early May 2000.

He received medication at SCMHC, and when he was discharged, he was stabilized enough to know he was hearing

voices. That stability faded over the next few days. Defendant received a referral to a mental health center for further medication. Under the referral, however, the earliest he could be seen by a doctor was two weeks away. Thus, defendant planned to go to the next available walk-in appointment -- six days after he was released.

Unfortunately, this incident occurred before he was able to carry out that plan. Defendant described the events of the day of the incident. He went outside of his apartment a couple of times that day, but did not leave the area. He thought the few people he saw were trying to shoot and kill him. He was also hearing voices. He thought he was speaking to the Russian President and directing United States generals about World War III through bugs in his apartment. Defendant believed a nuclear war had already started.

Defendant was also under the impression his ex-girlfriend was upstairs in the apartment above him and trying to torture him. At about 11:00 p.m., defendant left his apartment because he had to leave Sacramento to do something with the Russians. He climbed up onto the balcony of the apartment above him. He entered the apartment, sat on the couch, and saw a bundle on the floor. He reached down for the bundle and the victim sat up. Defendant picked her up by the armpits and sat her down next to him and told her it was okay. The voices told him the girl was an orphan from Chechnya. Defendant testified, "Then I got the feeling that something was wrong with this situation." Next, he walked to the door and Shannon M. and Richard L. were out front.

At the jail that night, defendant was placed in the jail's psychiatric ward because he threw a kick at another inmate. Defendant testified he has been on medication at the jail since he was incarcerated. He had not heard voices for many months. While he was testifying, defendant claimed to know the difference between right and wrong.

On cross-examination, defendant admitted to having abused methamphetamine around 1997. He also used marijuana in 1998.

Defendant knew the people who lived in the apartment above him had children. Defendant continued to deny that he molested the victim. He also claimed he did not speak with Shannon M. prior to entering the apartment. Defendant accused Shannon M. and the victim of lying about what happened. Defendant claimed he did not know why he had a screwdriver in his pocket. He also asserted that even in the midst of his delusion, he knew it was not right to molest a child. When he was confronted by Shannon M. and Richard L., defendant testified, "I realized I'd done something that wasn't right."

Defendant also admitted he knew putting the holes in his apartment was wrong. That was why he called his apartment manager to offer to fix the damage. Defendant also testified that on prior occasions he resisted the voices' demands that he steal because he knew stealing was wrong. During his prior 1994 episode of hallucinations, defendant knew it was wrong to kill someone.

Defendant testified generally it takes months for him to feel okay after a psychotic episode. After a day or two of

being on medication, he can understand the difference between reality and unreality. Defendant has been in the general jail population since 72 hours after he was committed to the facility.

III

Testimony of Dr. Lorin Frank

Psychologist Dr. Lorin Frank testified on defendant's behalf. Defendant retained Dr. Frank. Dr. Frank examined defendant's prior hospitalization records. Defendant had been first hospitalized in a psychiatric center at age 17. He had been hospitalized five or six times primarily for hearing auditory hallucinations or being delusional. The doctor said that most of the diagnoses shared the common thread of schizophrenia. Dr. Frank said on May 9, 2000, defendant was diagnosed as malingering, having bipolar disorder, being depressed, and having histrionic traits. The records also showed defendant was taking a number of different medications to treat schizophrenic symptoms.

Dr. Frank met with defendant twice in August 2000 (three months after the incident) to determine whether he fit the criteria for legal insanity. When Dr. Frank met with defendant, his mental condition had stabilized, presumably because defendant had been taking his medication.

During his interviews, defendant told Dr. Frank that immediately before the incident at issue here, defendant believed he was being followed and pursued by different United States government agencies. Defendant believed he had some

special powers that these agencies wanted to use and the agencies were trying to control him through thought broadcasting through the television or computer. Defendant reported he had been released from the psychiatric hospital without his medication two or three days prior to this event. He was trying to stay in his apartment until he could get his prescription filled. Defendant claimed to have climbed to the upstairs apartment to evade the government agencies. In contrast to defendant's trial testimony, defendant told Dr. Frank that while he was climbing upstairs, he was discovered, and he told the people not to worry, there was a girl tied up upstairs. When he went into the apartment, the victim was there and he picked her up and hugged her. Defendant denied molesting the victim, despite the fact Dr. Frank never asked him whether he had.

Dr. Frank administered the Minnesota Multi-Phasic Personality Inventory II (MMPI), an IQ test, the Rorschach Inkblot test, and the M Test. According to Dr. Frank, defendant's responses to each of the tests were internally consistent with each other.

The MMPI indicated significantly elevated results for defendant on the schizophrenia scale, the paranoia scale, the psychopathic deviant scale, the depression scale, and the anxiety scale. The MMPI indicated that it was valid for defendant and that he was answering the questions honestly. The IQ test showed defendant had an average IQ. Dr. Frank said defendant's responses to the M test, a test to measure

malingering, showed he was not malingering -- or faking his symptoms.

According to Dr. Frank, defendant's response to the Rorschach Inkblot test showed he "is in a state of chronic and substantial stimulus overload resulting from persistent difficulties in mustering adequate psychological resources to cope with the demands being imposed on him by internal and external events in his life, and that his adaptive capacities are not sufficient for him to manage ideational and emotional stresses in his life without becoming unduly upset by them."

Dr. Frank diagnosed defendant as schizophrenic, paranoid type. He also diagnosed substance abuse and considered defendant's psychosocial stressors to be severe.

Based upon his examination of the police report, records, tests, and interview with defendant, Dr. Frank concluded defendant met the definition of legal insanity at the time he committed the acts. Dr. Frank believed defendant was unable to appreciate the nature and quality of his actions. Dr. Frank also believed defendant "would in most cases not be able to distinguish right from wrong, and what I mean by that is that information that came to him under the category of his delusions, he would not be able to understand right from wrong." Among his other conclusions, Dr. Frank concluded defendant could not act in a purposeful, goal-directed manner to execute a plan of action.

Dr. Frank also explained that schizophrenics frequently respond well to incarceration because there is a great deal of

structure around them and their stress levels decrease. That is, there is personnel to take care of them and provide their medication.

On cross-examination, the People challenged Dr. Frank's assumptions and his potential bias. Dr. Frank explained he is retained by defendants 98 percent of the time and he concludes that about 20 percent of those referred to him for insanity reviews to actually be legally insane.

Dr. Frank admitted to not having interviewed any of defendant's family members or any of defendant's prior psychologists who had evaluated him. Dr. Frank confirmed it would be best to evaluate defendant as close to the time of the incident in question as possible.

Dr. Frank testified it is not unusual for men who molest children to be inadequate in adult sexual relations. He also stated defendant reported he had stopped dating women about five years before this incident.

Dr. Frank also testified that some chronic drug users may have symptoms that appear similar to schizophrenia. Defendant told Dr. Frank he used amphetamines and cocaine in the past, but that he had not used them in the past two years. Defendant refused to take a drug test when he was hospitalized the week just before this incident. Dr. Frank, further, did not review any of the jail medical records showing how defendant had been treated between the time he was incarcerated and the dates of his interviews with Dr. Frank.

Dr. Frank acknowledged defendant had been diagnosed by the SCMHC as malingering on May 9, 2000 (three days before the incident). Despite his claim that most of the prior hospitalizations were for schizophrenia, Dr. Frank also admitted that defendant had been diagnosed as having major depression in 1998, not schizophrenia. And, in 1996, defendant was diagnosed with bipolar disorder. In 1994, defendant was diagnosed as poly-substance abuse in remission and not as schizophrenic. Dr. Frank also stated it would be "not typical" for someone who is schizophrenic to be in and out of touch with reality within a relatively short period of time.

Dr. Frank admitted the Rorschach Inkblot test, the IQ test, the M test, and the MMPI test did not determine defendant's legal sanity.

Dr. Frank conceded the jury could evaluate defendant's ability to engage in goal-directed behavior in determining whether defendant understood right from wrong or appreciated the nature of his actions. Dr. Frank stated defendant may have engaged in goal-directed behavior if he had covered the victim's mouth to stop her from screaming and prevent himself from getting caught. Dr. Frank also testified that defendant's possession of a flat-head screwdriver could be construed as goal-directed behavior to break into the apartment. Dr. Frank said that defendant's actions of molesting the victim in the short time available could also be construed as goal-directed behavior.

Dr. Frank stated it appeared that defendant understood at some level he was going to be in trouble when Shannon M. told him she was going to call the police and he tried to prevent her from doing so. Dr. Frank admitted that denying a child molest occurred demonstrated defendant appreciated the wrongfulness of his actions.

IV

Testimony of Dr. Janice Nakagawa

Defendant also presented the testimony of psychologist Dr. Janice Nakagawa. Dr. Nakagawa was originally retained by the court to perform a sanity evaluation of defendant.

When she first began to testify, Dr. Nakagawa had reviewed defendant's jail medical records but failed to review any records prior to defendant's incarceration. Over night, during a break in her testimony, she was presented with the other medical records that were provided to Dr. Frank. Dr. Nakagawa noted these records contained quite a number of different diagnoses for defendant: "schizophrenia, bipolar disorder, the substance abuse, but the primary or principal [*sic*] diagnosis, whether it was depression, the theme was of some kind of psychotic condition."

In February 2001, Dr. Nakagawa performed a clinical interview of defendant over two separate occasions for a total of about five hours. Defendant relayed his mental health history to the doctor starting in 1987. Defendant's statements to Dr. Nakagawa were consistent with his trial testimony.

Dr. Nakagawa also administered a series of psychological tests to defendant: Bender Gestalt, a select portion of Wechsler Adult Intelligence Scale, Scale-III, Millon Clinical Multiaxial Inventory-III (MCMI), Draw-A-Person, House-Tree-Person, Rorschach Inkblot test, and Rogers Criminal Responsibility Assessment Scales.

Defendant's performance on the Bender Gestalt test presented some mild indicators of brain damage. Like Dr. Frank, Dr. Nakagawa concluded defendant had average intelligence.

Defendant's performance on the MCMI test showed elevations on the personality patterns involving depression, the avoidant personality, and the schizoid personality. Defendant also presented an elevated level of masochism. According to Nakagawa, the validity scales for the MCMI test indicated defendant responded to the questions in a straightforward, nondefensive way.

Contrasted with Dr. Frank's diagnosis, Dr. Nakagawa diagnosed defendant as having major depression recurrent with psychotic features. The psychotic features were his false beliefs and auditory hallucinations. Dr. Nakagawa also did not note any malingering or exaggeration of defendant's symptoms. In terms of her diagnosis, Dr. Nakagawa further concluded, "I am not wedded to my diagnosis or conclusion that he suffers from major depression recurrent. It is possible that it's a plain psychotic disorder not otherwise specified." Dr. Nakagawa concluded defendant suffered from a mental disorder at the time of the offense. Dr. Nakagawa believed defendant did not have

the ability to understand the nature and quality of his actions and was unable to distinguish right from wrong at the time of the incident. She based this conclusion on the information the defendant provided to her that he intended to save others, not harm them, and his very elaborate belief system about World War III.

Dr. Nakagawa concluded defendant was not able to act in a rational, purposeful, or goal-directed way to execute an appropriate plan of action. Defendant did not have the capacity to understand the rights of others, according to Dr. Nakagawa. Thus, the doctor concluded defendant was legally insane at the time of the event. Her overall conclusion was based upon the testing, the review of the records, and her clinical interview with defendant.

The People challenged Dr. Nakagawa's testimony on cross-examination. Dr. Nakagawa admitted she performed no independent investigation, but rather relied on what was supplied to her by defense counsel. Further, she did not consult with any other mental health professionals about this case. She did not contact members of defendant's family, anyone from his apartment complex, or any of the jail staff who dealt with him.

Dr. Nakagawa acknowledged the number of different mental health diagnoses defendant had received over the years, although she believed each diagnosis had the common trait of psychotic symptoms. Further, contradicting Dr. Frank's opinion, Dr. Nakagawa did not believe defendant suffered from schizophrenia.

Dr. Nakagawa also acknowledged that defendant had been diagnosed as malingering when he was discharged the week before this incident. The only possible explanation Dr. Nakagawa could provide was that defendant stabilized during his earlier treatment program causing his treating physician to doubt the true nature of his condition. Dr. Nakagawa was not troubled by the fact that defendant stabilized very shortly after he was incarcerated. She surmised his medication had taken effect, although she was quick to point out she was not a psychiatrist.

Dr. Nakagawa agreed methamphetamine use might create symptoms similar to someone having psychosis from mental illness. Dr. Nakagawa also stated defendant underreported his prior substance abuse problems and that an accurate assessment of defendant's prior drug use was important to her.

Dr. Nakagawa stated the IQ test did not measure anything that related to whether defendant was sane. She admitted the Draw-A-Person test and House-Tree-Person test similarly did not directly bear on the question of whether defendant was sane. The Bender-Gestalt test did not bear on the question of defendant's sanity, nor did it show significant indicators of brain damage. The Rorschach Inkblot test did not address defendant's sanity on the day of the event. Finally, Dr. Nakagawa admitted the MCMI test did not measure defendant's sanity at an earlier time.

Dr. Nakagawa testified if defendant picked up the victim and covered her mouth, she would consider that goal-directed behavior toward the completion of the crime. Further, Dr.

Nakagawa testified that one explanation of defendant having a screwdriver in his pocket was that defendant planned to engage in the goal-directed behavior of breaking into the apartment. Dr. Nakagawa admitted defendant's actions of lunging at Shannon M. could be considered goal-directed behavior if he was not psychotic.

V

The People's Rebuttal

In rebuttal, the People presented the testimony of Sacramento Sheriff's Deputies John Carriger and James Tomasetti. These two deputies supervised defendant in the jail since his arrest for this incident. Deputy Carriger testified defendant was placed in the inpatient psychiatric floor for three days when he was first brought into the jail after his arrest. After the three days, he was placed into protective custody. Defendant had not been a disciplinary problem at the jail. He followed directions and had not displayed any behaviors that might be indicative of mental problems. Carriger also testified defendant was on "psych" medication while he was at the jail. Deputy Tomasetti testified during his jail encounters with defendant, Tomasetti never had any problems with him.

The jury found defendant to be sane at the time he committed the crimes. The trial court sentenced defendant to 25 years to life on the charge of lewd act on a child under the age of 14.

DISCUSSION

I

Sanity

Defendant argues "no substantial evidence supported [the jury's] finding of sanity." We disagree.

California follows the two-prong test adopted by the House of Lords in *M'Naghten's Case* (1843) 10 Clark & Fin. 200, 210 [8 Eng.Rep. 718]. Legal insanity is established where "the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act [or] of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25, subd. (b); *People v. Kelly* (1992) 1 Cal.4th 495, 533.) Defendant has the burden of establishing by a preponderance of the evidence that he was insane at the time of the crime. (*People v. Drew* (1978) 22 Cal.3d 333, 348-349.)

"Because the burden was on the defense to show by a preponderance of the evidence that appellant was insane, before we can overturn the trier of fact's finding to the contrary, we must find as a matter of law that the court could not reasonably reject the evidence of insanity." (*People v. Skinner* (1986) 185 Cal.App.3d 1050, 1059 (*Skinner I*).) "[I]f neither party presents credible evidence on that issue the jury must find [the defendant] sane. Thus the question on appeal is not so much the substantiality of the evidence favoring the jury's finding as whether the evidence contrary to that finding is of such weight

and character that the jury could not reasonably reject it." (*People v. Drew, supra,* 22 Cal.3d at p. 351.)

"The value of expert testimony in assisting the trier of fact on the sanity question depends on the material from which the opinion is drawn and on the reasoning of the witness." (*Skinner I, supra,* 185 Cal.App.3d. at p. 1060.) "'"However impressive this seeming unanimity of expert opinion may at first appear . . . our inquiry on this just as on other factual issues is necessarily limited at the appellate level to a determination whether there is substantial evidence in the record to support the [court's] verdict of sanity . . . . [Citations.] It is only in the rare case when 'the evidence is uncontradicted and entirely to the effect that the accused is insane' [citation] that a unanimity of expert testimony could authorize upsetting a . . . finding to the contrary." [Citation.] Indeed [the Supreme Court has] frequently upheld on appeal verdicts which find a defendant to be sane in the face of contrary unanimous expert opinion.' [Citations.]" (*Id.* at p. 1059.)

In *People v. Coogler* (1969) 71 Cal.2d 153, 161-166, the defendant presented the testimony of a psychiatrist, a psychologist, and a neurologist, who collectively concluded the defendant was unable to commit a murder with deliberation and premeditation based upon his diminished mental capacity. Acknowledging the prosecution presented no contradictory expert testimony, our Supreme Court stated, "[a]lthough unanimity of expert opinion carries persuasive value [citation], a jury, under certain circumstances, can properly reject such opinions.

As we recently explained in *People v. Bassett* (1968) 69 Cal.2d 122, 141 [70 Cal.Rptr. 193, 443 P.2d 777], '"The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion . . . ."' [Citation.]" (*Id.* at p. 166.) In *Coogler,* the court concluded the jury could properly reject the experts' conclusions because of doubt as to the material upon which these conclusions were based. (*Ibid.*) "In short, a jury in considering defendant's capacity to premeditate and deliberate could properly accept defendant's evidence *or* it could equally properly reject the lone psychiatrist's opinion based upon defendant's self-serving descriptions of his alleged past blackouts and lack of memory of the acts in question." (*Id.* at pp. 167-168, fn. omitted.)

In *People v. Samuel* (1981) 29 Cal.3d 489, the issue presented was the defendant's current competence to stand trial. The Supreme Court concluded the jury could not reject the undisputed testimony of five psychiatrists, three psychologists, a doctor, and a nurse that defendant currently did not have the capacity to cooperate with his counsel in defending himself. (*Id.* at pp. 497-498, 506.) The *Samuel* court recognized the difference between determining a defendant's present competency and "speculating about [the defendant's] state of mind at some time in the past." (*Id.* at p. 502.) In making this decision, however, the court noted, "[b]ecause the M'Naghten rule . . . was defined in terms not of mental capacity but of moral

awareness, and because under that rule the experts were asked to speculate about the defendant's state of mind at the moment the crime was committed, we recognized that their opinions, even when unanimous, were not necessarily controlling." (*Id.* at p. 502.)

Here, both experts declared defendant was "legally insane" at the time he committed the crimes. They specifically testified defendant was unable to understand the nature and quality of his actions and was unable to distinguish right from wrong at the time of the commission of the offenses. For the following reasons, we conclude the jury could have reasonably rejected this testimony.

As an initial matter, we must note the issue here was not whether defendant had a mental illness. At trial, even the People conceded defendant had a serious mental illness. However, simply having a mental illness is not sufficient to establish insanity in California. The key questions the jury needed to answer was whether as a result of his mental illness, defendant knew right from wrong or whether he appreciated the nature and consequences of his actions. (*People v. Skinner* (1985) 39 Cal.3d 765, 768-769 (*Skinner II*).)

On these key questions, the jury heard the testimony of defendant and was in the unique position to evaluate him and his credibility. It also heard his statements at the time of the crime. Evidence of defendant's actions and statements at the time of the crime is powerful evidence of defendant's sanity at the time. (*People v. Wolff* (1964) 61 Cal.2d 795, 805-808.)

"Among the kinds of conduct of a defendant which our courts have held to constitute evidence of legal sanity are the following: 'an ability on the part of the accused to devise and execute a deliberate plan' [citation]; 'the manner in which the crime was conceived, planned and executed' [citation]; the fact that witnesses 'observed no change in his manner and that he appeared to be normal' [citation]; the fact that 'the defendant walked steadily and calmly, spoke clearly and coherently and appeared to be fully conscious of what he was doing' [citation]; and the fact that shortly after committing the crime the defendant 'was cooperative and not abusive or combative' [citation], that 'questions put to him . . . were answered by him quickly and promptly' [citation], and that 'he appeared rational, spoke coherently, was oriented as to time, place and those persons who were present' [citation]." (*Id.* at pp. 805-806.)

Defendant presented direct evidence of his ability to recognize right from wrong and that he knew the nature and quality of his actions. He relayed the facts of his crime to the jury in great detail indicating his ability to engage in goal-oriented behavior. Moreover, defendant admitted he knew he had done something "that wasn't right" when he heard Shannon M. pounding on the door of the apartment. When he was confronted by Shannon M., defendant's attempt to escape showed he knew what he had done and that it was wrong. Indeed, defendant testified he knew it was not right to molest a child and continued to deny to the jury he had molested the victim even after he was convicted of this crime.

While the eyewitnesses testified defendant was a zombie or out of it, he appeared to snap out of this state quickly. He recognized the people around him and responded to them appropriately. Defendant testified it takes months for him to recover from these episodes and at least a few days of medication before he can understand reality from unreality. Even one of the experts claimed a quick change in his mentality was not likely. Despite his elaborate statement at trial of reasons for climbing into the apartment, defendant did not share them with the arresting officer when he arrived, but instead informed the officer of his mental illness and his medications.

Defendant provided other evidence he understood right from wrong even when he was under the influence of his delusions. Defendant stated he knew it was wrong to murder people even though the voices in his head urged him to kill. Defendant knew it was wrong to kick holes into the wall of his apartment even though the voices told him to do that. Further, defendant testified he knew it was wrong to steal when the voices in his head told him to shoplift.

We believe the jury could have reasonably rejected as speculation the defense experts' attempts to characterize defendant's mental state. Both experts' opinions were based upon medical records that contained a wide range of diagnoses of defendant over the prior years. While both doctors claimed they believed defendant was not malingering, they both admitted defendant had been diagnosed as malingering by other mental health professionals immediately prior to this incident.

The divergence of professional views about the state of defendant's mental health over the years casts doubt on the experts' abilities to properly diagnose this defendant. For example, even at this trial, these two experts disagreed on defendant's fundamental diagnosis. Dr. Nakagawa testified defendant was major depression recurrent with psychotic features. Dr. Nakagawa further contended defendant was not a schizophrenic. On the other hand, Dr. Frank testified defendant's primary diagnosis was schizophrenia.

The psychologists' testimony itself was equivocal on key points. For instance, Dr. Frank testified defendant "would *in most cases* not be able to distinguish right from wrong." (Italics added.) Dr. Nakagawa testified she was "not wedded to [her] diagnosis or conclusion that defendant suffered from major depression recurrent." Both experts admitted that the numerous impressive sounding tests they administered to defendant did not predict whether defendant was insane at the time he committed the crimes.

Dr. Nakagawa's original opinion was based solely on defendant's jail records for his current incarceration. It is true that when she received the remaining records, she concluded nothing in them changed her opinion. However, her limited review prior to trial based on incomplete medical records reflects on the substance of her opinion.

Another weakness in the experts' opinions is both interviewed defendant significantly after the date of the incident. Dr. Frank interviewed defendant three months later

and Dr. Nakagawa interviewed defendant nine months later. Thus, their testimony was necessarily speculative as to how defendant was behaving at the time of the crime -- months earlier. In addition, neither doctor independently investigated anything defendant told them. To the extent the experts relied on the untested statements of defendant, the jury could properly accept or reject these experts' opinions. (See *People v. Coogler, supra,* 71 Cal.2d at pp. 167-168.)

Both experts said that methamphetamine use could mimic the psychotic symptoms defendant presented. Defendant admitted he abused methamphetamine. Dr. Nakagawa also testified defendant underreported his use of methamphetamine during the interviews upon which she based her opinion. It is also notable that defendant refused to take a drug test when he was admitted to the mental health hospital the week prior to this incident. This evidence tended to undermine the opinions of the experts.

Dr. Frank asserted the jury could assess for itself whether defendant knew right from wrong or appreciated the nature of his actions by ascertaining whether defendant acted in a goal-directed manner during the crimes. The experts admitted that if defendant had covered the victim's mouth, this would be indicative of goal-directed behavior. Both admitted possession of the screwdriver could also be evidence of goal-directed behavior to break into the apartment. Finally, Dr. Nakagawa admitted the lunging at Shannon M., shown by the evidence at trial, could be construed as goal-directed behavior.

Finally, we note the trial court rejected defendant's argument the evidence was insufficient to establish his sanity in the context of a motion for a new trial. The trial court could not "find that the verdict was contrary to the evidence in this case."

We agree with the trial court that there was substantial evidence to support the jury's verdict of sanity. The jury could have reasonably rejected defendant's expert opinion evidence of insanity. This is not the rare case where the unanimity of expert testimony authorizes us to upset the jury's finding to the contrary.[3]

II

Lewd Intent

Defendant argues substantial evidence does not support the jury's finding defendant had lewd intent when he picked up the victim and touched her vagina. We disagree.

"Criminal intent will rarely be shown by direct evidence and must frequently be inferred from a defendant's conduct." (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1380.) "The intent to commit a violation of Penal Code section 288 is 'the

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[3] We find the People's argument that Dr. Frank's and Dr. Nakagawa's testimony was "inherently suspect *ab initio* because they were psychologists rather than psychiatrists" to be disingenuous at best. As pointed out by defendant, as long as they are qualified, licensed psychologists with doctoral degrees in psychology they may properly testify as to the sanity of a person at trial. (§ 1027 (a); *People v. Davis* (1965) 62 Cal.2d 791, 801.)

intent of arousing, appealing to, or gratifying the lust or passions or sexual desires' of the perpetrator or of the victim. [Citation.]" (*People v. Imler* (1992) 9 Cal.App.4th 1178, 1181.) "[L]ewd conduct may be inferred from the circumstances of the offense." (*Id.* at p. 1180.) "'[T]he trier of fact looks to all the circumstances, including the charged act, to determine whether it was performed with the required specific intent.' [Citations.] Other relevant factors can include the defendant's extrajudicial statements [citation], other acts of lewd conduct admitted or charged in the case [citations], the relationship of the parties [citation], and any coercion, bribery, or deceit used to obtain the victim's cooperation or to avoid detection [citation]." (*People v. Martinez* (1995) 11 Cal.4th 434, 445.)

Here, the evidence established defendant climbed up a fence, broke into the victim's apartment at 11:00 p.m., picked up the victim, put her on his lap facing away from him, and touched her vaginal area over her underwear. Defendant would not let her go despite the little girl's efforts to escape and tried to cover her mouth. Defendant then created a story that he was there to save a little girl and attempted to escape after he was confronted. Under these circumstances, defendant's acts were not susceptible to an innocuous explanation. (*People v. Gilbert*, *supra,* 5 Cal.App.4th at p. 1380.) The jury, examining this evidence in the light most favorable to the judgment, could properly conclude this evidence established defendant's lewd intent.

III

Cruel and Unusual Punishment

Defendant claims his punishment of 25 years to life is cruel and unusual under both the state and federal Constitutions. We disagree.

A

California Standard

A punishment may violate the California Constitution, if, although not "cruel and unusual" in its method, the punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*).) *Lynch* identified three techniques used to apply this rule: (1) examining the nature of the offense and the offender; (2) comparing the punishment with more serious crimes in the same jurisdiction; and (3) comparing the punishment with the penalty for the same offense in different jurisdictions. (*Id.* at pp. 425-427.) Defendant focuses on the first and second prongs of this test.

In *People v. Crooks* (1997) 55 Cal.App.4th 797, 806, 809 (*Crooks*), we rejected the argument that section 667.61 constituted cruel and unusual punishment under both the state and federal Constitutions. In *Crooks,* the defendant broke into the victim's apartment armed with a knife, slapped her, and then raped her by force. (*Id.* at pp. 801-802.) The trial court sentenced the defendant to 25 years to life under section 667.61 because he committed the rape while engaged in the commission of

a burglary. (*Crooks*, at p. 804.) Under the first prong of the *Lynch* test, "we must consider not only the offense as defined by the Legislature but also 'the facts of the crime in question' (including its motive, its manner of commission, the extent of the defendant's involvement, and the consequences of his acts); we must also consider the defendant's individual culpability in light of his age, prior criminality, personal characteristics, and state of mind." (*Id.* at p. 806.) We found the application of the first prong did not favor the defendant. The defendant's insignificant prior record and his blood alcohol level mitigated his offense. (*Id.* at pp. 806-807.) His crime, however, was serious and dangerous to society because it had an element of planning in the defendant's entry and execution of the crime. (*Id.* at p. 807.) Defendant further showed callousness in choosing a sleeping victim. (*Ibid*.)

Under the second prong of the *Lynch* test, the *Crooks* defendant argued "that his penalty under section 667.61 is harsher than that imposed in California for any type of unlawful killing short of first degree murder or for any type of sexual offense (including a violation of section 261, subdivision (a)(2)) not committed in the course of a first degree burglary." (*Crooks*, *supra,* 55 Cal.App.4th at p. 807.) We concluded defendant's "argument ignores the fact that defendant's acts involved both the commission of more than one kind of offense (rape and first degree burglary) and the commission of one offense for the purpose of committing another. The penalties for single offenses, such as those defendant cites, cannot

properly be compared to those for multiple offenses -- especially where, as here, one offense was committed in order to commit another. Moreover, the gravity of the two crimes committed by defendant (burglary and rape) is greater than the sum of their parts: being raped in her own home is a woman's worst nightmare." (*Ibid.*) "The Legislature has chosen to make other offenses not involving homicide punishable by life imprisonment without possibility of parole: kidnapping for the purpose of ransom, extortion or robbery with bodily harm short of death (§ 209, subd. (a)) and attempted train wrecking (§ 218). Such sentences have been found not to constitute cruel or unusual punishment because the Legislature could reasonably decide that crimes which involve an inherent danger to the life of the victim are particularly heinous even if no death occurs." (*Id. at* pp. 807-808, fn. omitted.)[4]

In *People v. Estrada* (1997) 57 Cal.App.4th 1270, 1273 (*Estrada*), Division Seven of the Court of Appeal, Second Appellate District rejected a claim of cruel and unusual punishment under section 667.61 for a conviction of burglary and forcible rape. The defendant was a 38-year-old man with no prior felony record, and "he used no weapon and made no threats of present or future harm to the victim. . . . [and] he did not strike the victim or choke her or cause any harm to her beyond the physical and psychological harm inherent in the crime of

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[4] The *Crooks* defendant made no showing under the third prong of the *Lynch* test. (*Crooks*, *supra,* 55 Cal.App.4th at p. 808.)

rape." (*Estrada*, at p. 1278.) The appellate court concluded that the defendant had the requisite maturity to appreciate the nature of his actions and their foreseeable consequences. (*Id.* at p. 1280.) As to the nature of the crime, "[b]urglary of an inhabited dwelling also poses a risk to human life. . . . When we add to the risk of residential burglary the risk of rape by means of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury' (§ 261, subd. (a)(2)) it is clear the punishment of life *with* the possibility of parole after 25 years is not constitutionally out of line with other California punishments." (*Id.* at pp. 1281-1282.)

The defendant in *Estrada* also claimed that California punished other more culpable crimes less severely than rape in the course of a burglary, i.e., second degree murder. (57 Cal.App.4th at pp. 1280-1281.) The appellate court rejected this argument. (*Id.* at p. 1282.) The court explained that the defendant improperly attempted to compare the punishment for a defendant who commits a single crime to one who has committed multiple offenses. (*Ibid.*)

Here, we examine defendant. He is a 33-year-old mentally ill man. Defendant has never been married, has no children, and lived alone at the time of this incident. He has no employment and receives Social Security disability income. He is not an inexperienced youth. (See *Estrada, supra,* 57 Cal.App.4th at p. 1280, citing *People v. Dillon* (1983) 34 Cal.3d 441, 488.) He admits that throughout his childhood he engaged in the delinquent behavior of running away from home on a regular basis

and was made a ward of the court. He has a prior conviction for possessing a switchblade knife and trespassing arising out of an incident where he broke into a home while he was armed.

Further, defendant's crime constituted one of the most intimate and threatening of violations. Defendant's victim was a six-year-old child. Defendant preyed on this little girl while she slept in the "safety" of her home. The screwdriver in defendant's back pocket suggests defendant planned this offense ahead of time.

This crime was not merely opportunistic or the result of a suddenly developing situation. (See *Estrada, supra,* 57 Cal.App.4th at p. 1280, citing *People v. Dillon supra,* 34 Cal.3d at p. 488.) The jury found defendant broke into the apartment for the express purpose of molesting this little girl. Defendant's entry into an inhabited home in the dead of night for the express purpose of committing this crime created the risk of serious harm to all involved. The first prong of the *Lynch* analysis supports the penalty imposed.

Under the second prong of the *Lynch* analysis, defendant claims his punishment is "grossly disproportionate" because it is the same as that imposed for someone who commits "cold-blooded premeditated murder." We reject this analysis. As noted in *Crooks* and *Estrada*, defendant's comparison of the single crime of murder to the instant two crimes is improper -- especially, as here, one offense was committed in order to commit the other. The Legislature may properly impose harsher

punishment against criminals who purposefully seek to sexually victimize our children in their homes.

Defendant's sentence does not offend the California Constitution's bar on cruel and unusual punishment.

B

Federal Standard

Defendant fares no better under the federal standard.

The Eighth Amendment to the United States Constitution also prohibits cruel and unusual punishment. Strict proportionality between crime and punishment is not required, however. "'Rather, [the Eighth Amendment] forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135.)

Defendant relies on *Solem v. Helm* (1983) 463 U.S. 277 [77 L.Ed.2d 637] and *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [115 L.Ed.2d 836, 869]. In *Crooks, supra,* 55 Cal.App.4th at pages 805-806, we analyzed *Solem* and *Harmelin*. We rejected that defendant's claim that his 25-year-to-life sentence for a rape committed during a burglary was cruel and unusual punishment. (*Crooks, supra*, 55 Cal.App.4th at pp. 805-806.) We noted, "[i]n *Solem*, the court found unconstitutional a life sentence without the possibility of parole for a seventh nonviolent felony. A bare majority of the court held '. . . a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the

sentences imposed for commission of the same crime in other jurisdictions.' [Citation.]" (*Id.* at p. 805.) We concluded that "*Solem* is weakened by *Harmelin v. Michigan* (1991) 501 U.S. 957 [111 S.Ct. 2680, 115 L.Ed.2d 836], in which a life sentence without possibility of parole for possessing 672 grams of cocaine was upheld." (*Ibid.*) In *Harmelin*, seven justices supported a proportionality review but only four favored application of all three factors set forth in *Solem*. (*Crooks*, at pp. 805-806.) We also noted "[t]he defendant in *Harmelin* was lawfully sentenced to life without parole (LWOP) for possessing a large quantity of drugs. Defendant here, a forcible rapist, received a lesser sentence." (*Id.* at p. 806.) We concluded "Defendant's sentence is not 'grossly disproportionate' to defendant's more serious crimes." (*Ibid.*)

The Supreme Court of the United States has upheld statutory schemes that result in life imprisonment for recidivists upon a third conviction for a nonviolent felony in the face of challenges that such sentences violate the federal constitutional prohibition against cruel and unusual punishment. (See *Ewing v. California* (2003) ___ U.S. ___, [155 L.Ed.2d 108] [25 years to life sentence under three strikes law for theft of three golf clubs worth $399 apiece]; *Lockyer v. Andrade* (2003) ___ U.S. ___, [155 L.Ed.2d 144] [two consecutive terms of 25 years to life for two separate thefts of less than $100 worth of videotapes].)

In this case, as we discussed in connection with his California constitutional claim, defendant's sentence is not

grossly disproportionate to the crime for which he is being punished. As a result, his Eighth Amendment claim fails.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P.J.

SIMS, J.